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IN THE

Supreme Court of the United States

October Term—1951

No. 704.

JAMES J. MORAN,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HENRY G. SINGER,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:

Petitioner, James J. Moran, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 25th, 1952 (p. 63)*.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1), Rule 37(b)(2) and Rule 45(a)

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* "p" references are to pages in the "Supplement" to the Transcript of Record. "f" references are to folios in the Transcript of Record.

of the Federal Rules of Criminal Procedure. By order of Mr. Justice Jackson dated March 14th, 1952, petitioner's time to file this application was extended to April 24th, 1952 (p. 64).

Opinion Below

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been officially reported. It appears on pages 57 to 63 of the Supplement to Transcript of Record.

Statement of the Matters Involved

The judgment of the Court of Appeals sought to be reviewed affirmed petitioner's conviction of a violation of the perjury statute (18 U. S. C. Section 1621) in testifying falsely to a material matter before a Sub-Committee of the United States Senate's Special Committee to Investigate Organized Crime in Interstate Commerce. Petitioner's testimony was given in New York City on March 16th, 1951 when Senator Kefauver was Chairman and the only committeeman present. Petitioner then testified that while he was First Deputy Commissioner of the City of New York a man named Louis Weber had visited him possibly three and not more than five times. This testimony, alleged in the indictment to be knowingly false, formed the only count submitted to the jury, the Court having ruled that the prosecutor must elect on which of the three counts of the indictment to proceed. Upon the verdict of the jury, the Court imposed a maximum sentence of five years imprisonment and a fine of $2,000.00 (p. 58).

The Court of Appeals held that the petitioner could be convicted of perjury despite the fact that the testimony was given at a hearing (where he was not represented by counsel), which was conducted before a battery of microphones, newsreel cameras, flash light photographers, glaring lights and television cameras, and where the proceedings were broadcast to an estimated audience of 30,000,000. Petitioner claimed at the trial that the above manner of conducting the hearings made the tribunal incompetent. Such Committee procedure has evoked an avalanche of unfavorable comment, professional and otherwise, and has resulted in the Legislature of the State of New York making such conduct criminal (Civil Rights Law, Section 52) and has caused the Speaker of the House of Representatives to direct that future hearings of House Committees may not be broadcast by radio or television.

Purporting to act upon authority delegated by the Senate, the Chairman of the Sub-Committee, Senator Kefauver appointed himself a quorum of one to take petitioner's testimony, and this was approved by the Court of Appeals, notwithstanding *Christoffel* v. *United States,* 338 U. S. 84.

The Court of Appeals held that testimony of petitioner was material, even though there was no proof that the subject matter related to utilization of interstate facilities. Indeed, the Government's brief in the Court of Appeals acknowledged that the Government had not intended to prove that Weber, whose visits to petitioner was the only issue in the case, was engaged in any illegal activities at the time of the visits.

A "10 minute speed-up" (p. 61) of a motion picture film of the three-hour proceeding before the Committee was admitted in evidence and shown to the jury upon a screen in the darkened court room, without opportunity to defense

counsel to examine it first. The Court of Appeals said of the last that "such a procedure was highly irregular" (p. 61).

Although the Trial Judge said he was "somewhat in sympathy with your [petitioner's] position" (f. 100), he nevertheless denied an application for a continuance, made upon the ground that there was a tidal wave of adverse publicity accompanied by the release of the Senate Committee's report two days before trial, which report severely castigated petitioner.

The Government in its direct case, offered evidence to attack petitioner's character and reputation, by proof of (1) history of petitioner's life, background, education and work record; (2) petitioner's lack of qualification for various public offices he had held; (3) petitioner's close relationship and dealings with ex-Mayor O'Dwyer, when O'Dwyer was District Attorney of Kings County, (4) petitioner's authority and actions while Water Commissioner of the City of New York. Petitioner did not testify.

The Government conceded in the Court of Appeals that it never intended to prove the "derogatory" and prejudicial remarks made in the prosecutor's opening statement to the jury. This was entirely overlooked by the Court of Appeals; its ruling was based on the belief that they could not say "that when the opening was made the prosecutor did not intend to prove the statements he made" (p. 59).

The evidence was not sufficient to satisfy the perjury two-witness rule.

Questions Presented

1. Did the Senate Sub-Committee cease to function as a competent tribunal when it (a) invited and permitted its

proceedings while petitioner was being examined to be broadcast by television and radio; (b) to be recorded by moving picture cameras set up in the hearing room, which was one of the courtrooms in the New York City Federal Courthouse; (c) allowed special bright lights to be set up and to aid the motion picture and television photographers; (d) permitted photographers to flash their light bulbs at petitioner while he was uttering the very words which later were charged as perjury; (e) permitted general disorder and lack of decorum to take the place of the calm and quiet inherent in the concepts of proceedings before competent tribunals; (f) permitted three witnesses (one of them the petitioner) to testify under oath at one and the same time, occupying the witness stand simultaneously?

2. Did the Court of Appeals err in holding that one member of a Special Committee was a quorum sufficient to constitute a competent tribunal?

3. Did the Court of Appeals err in holding that the number of visits by Weber to petitioner was material to the inquiry, even though (a) there was no proof that the subject matter related to the utilization of interstate facilities, and (b) the Government conceded that it did not intend to establish any illegal activities by Weber during the period of time covered by the visits?

4. Did the Court of Appeals err in holding that the display before the jury upon a motion picture screen, in the darkened court room, of a "ten minute speed-up" of a film (without sound track) purporting to be a photographic record of the three hour hearing of petitioner before Senator Kefauver was properly in evidence, especially since (a) the film was not shown to counsel before introduction in evidence; (b) there was no testimony that the speed-up was an accurate and fair representation of

the scene; (c) no reason appeared for the theatrical display except to recreate the passion and prejudice which existed at the time of the original hearing?

5. Did the Court of Appeals err in holding that the trial was not unfair where (a) the motion for continuance was denied under circumstances which evoked a statement from the Trial Court that he was "somewhat in sympathy" with petitioner's position; (b) testimony as to petitioner's reputation and character was admitted as part of the Government's direct case: (1) history of petitioner's life, background education and work record; (2) petitioner's lack of qualification for various public offices he had held; (3) petitioner's close relationship and dealings with ex-Mayor O'Dwyer when O'Dwyer was District Attorney of Kings County; (4) petitioner's authority and actions while Water Commissioner of the City of New York, long after the Weber visits; (c) proof of the criminal record of Weber was admitted in evidence; (d) testimony of the investigation by the Committee of "extortion, waterfront racketeering," and "murder cases" was admitted; (e) the prosecutor made many derogatory and prejudicial statements in his jury opening, which he admitted before the Court of Appeals he never intended to prove?

6. Did the Court of Appeals err in holding that the two-witness rule in perjury cases was here satisfied even though the witnesses did not corroborate each other as to Weber's visits on any specific day or days, nor did any two witnesses testify jointly as to a single visit by Weber?

Reasons for Granting the Writ

1. This case involves principles of civil rights and due process the settlement of which is of importance to the

public. It thus qualifies as one in which this Court should grant certiorari. (*Layne & Bowler Corp.* v. *Western Well Workers Inc.*, 261 U. S. 387, 393, opinion by Taft Ch. Justice, quoted by Mr. Justice Frankfurter in *U. S.* v. *Shannon* (Jan. 14, 1952) 96 Law Edition Advance Opinions, No. 6, pages 221-224.) Judicial review and adjudication is required for the guidance of the public, the bench and even of Congress, of the practice of conducting examinations of witnesses in criminal investigations before Congressional committees in the presence of and under the egis of batteries of microphones, news reel and television cameras, glaring lights and flash bulbs. The due process clause of the Constitution is binding upon Congress and Congressional committees no less than upon courts and administrative bodies.

2. The decision of the Court of Appeals below, with respect to the quorum requirement of Special Committees appears to be in conflict with the decision of this Court in *Christoffel* v. *U. S.* (338 U. S. 84) and the Legislative Reorganization Act of 1946 (60 Stat. L. 812).

3. This Court has considered the element of materiality in interrogation of witnesses before Congressional investigative committees to be important in the administration of justice, and worthy of attention (*Sinclair* v. *U. S.*, 279 U. S. 263; *Kilbourne* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135).

4. Important questions in the administration of criminal justice rendering it appropriate for this Court to grant certiorari are raised by the petition as noted in "Subject Matter Involved" and "Questions Presented" *supra*. (*Bollenbach* v. *U. S.*, 326 U. S. 607, 608.)

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honor-

able Court, directed to the Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceeding in said Court herein, being the case numbered and entitled in its docket as "United States of America v. James J. Moran" App. No. 140, Docket No. 22207, October Term, 1951, and that the judgment of said Court be reviewed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, April 11, 1952.

JAMES J. MORAN
Petitioner

By: .....
HENRY G. SINGER
Attorney for Petitioner

JOSEPH LEARY DELANEY,
HARRY SILVER, *with him on the Petition.*

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, April 11, 1952.

HENRY G. SINGER
Attorney for Petitioner and a Member of the Bar of this Court

IN THE

Supreme Court of the United States

October Term—1951

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JAMES J. MORAN,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

Statutes Involved

The Federal statutes involved are 18 U. S. Code, Sec. 1621 and Senate Resolution 202 (81 Congress 2d Session) which appears in the record as Government's Exhibit 2 (ff. 888-890).

Statement of Facts

The third count of the indictment (this was the only count that went to the jury) charges a violation of Sec. 1621 (Perjury) in that petitioner, while a witness before a sub-committee of the Special Committee to Investigate Organized Crime in Interstate Commerce, testified falsely

with respect to the number of visits made to him by one named Weber. Petitioner said that the visits were three or five, while the Government charged that the visits were "no less than approximately 50 times" (ff. 11-14, 20-24).

The Proceedings Before the Committee

It was established that petitioner and two other witnesses were interrogated almost simultaneously (ff. 108, 673, Government's Exhibit 12). Only Senator Kefauver was present while petitioner was testifying (ff. 638, 679-680, Government's Exhibit 12).[1] During the time petitioner was on the witness stand before Senator Kefauver confusion and excitement prevailed. Members of the working press were walking around the room, news photographers were flashing their light bulbs before petitioner's eyes, motion picture cameras were whirring at top speed, while petitioner under the glare and the heat of heavy Klieg lights necessary for the production of motion pictures and the transmission by the television cameras was being literally sweated (ff. 288-291, 631-637, and Government's Exhibit 12). A radio loud speaker was connected to a point directly in front of petitioner so that when he was obliged to answer his voice as well as the voice of the inquisitor could be simultaneously broadcast over a number of radio and television stations to an avid audience of 30 million (f. 66).

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[1] Government's Exhibit 12 is a motion picture "ten minute speed-up" (p. 61) of the three hour session of the Kefauver hearings and of course does not appear in the transcript of the record. It was a part of the record in the Court of Appeals by stipulation (ff. 924-927). If examination of the film is required, its production can be procured through the United States Attorney for the Southern District of New York.

Scope of the Kefauver Committee

A resolution creating the committee was offered in evidence (ff. 886-895, Senate Resolution 202, 81st Congress 2nd Session). The minutes of the committee meeting held on September 6, 1950 which allegedly authorized Senator Kefauver as Chairman to appoint a sub-committee "of one or more senators, of whom one member will be a quorum for the purpose of taking testimony and all other committee acts * * * in the State of New York" was admitted as Government Exhibit 1 (ff. 882-885). It was also established by Certificate of the Secretary of the Senate that Senators O'Connor, Hunt, Tobey, Kefauver and Wiley were appointed as members of this Special Committee (Government's Exhibit 3, ff. 898-900).

Number of Weber's Visits

Four receptionists employed in the office of the First Deputy Fire Commissioner of the City of New York testified in substance that they saw Weber visit petitioner.

Daly said that he could not say "how many times Mr. Weber actually saw Mr. Moran during that period" even though Weber was in the reception room "about 30 times" (ff. 406-407, 414, 446-447). McAllen said that he saw Weber 6 times but that Weber saw petitioner only 4 times (ff. 464-470, 472). Martin said Weber was at the reception room about "60 or 65 times" and that petitioner "saw Weber approximately about 50 times" (ff. 485-486, 504-505, 508). Doyle said that Weber visited the reception room "about 40 or 50 times" and that petitioner saw Weber only "about 15 times" (ff. 570-571, 578-579, 586).

None of the witnesses could specify a date, week, or particular month when petitioner saw Weber even though

a synopsis of many of the Board meetings over which petitioner presided during the period of the time involved in the receptionists' testimony was offered in evidence to assist the witnesses (Defendant's Exhibit B, ff. 901-915). No proof was offered by the Government of what was said between petitioner and Weber on any of these visits.

Other items of evidence will be discussed in the course of the argument.

ARGUMENT

I

The examination of petitioner under the circumstances herein described violated the due process amendment and destroyed the competency of the tribunal.

This Court has recognized the validity of the concept of the loss of competency or jurisdiction by a tribunal where there has occurred drastic disorder interfering with the course of justice (*Frank* v. *Mangum*, 237 U. S. 309, 335-336). Although, in the cited case, the disorder was occasioned by manifestations of public sentiment, this Court noted therein that no form of disorder whatever, irrespective of source, was to be lightly treated where interference with the course of justice results (336). Indeed, it would appear that the true gravamen of the occurrence productive of loss of jurisdiction or competency, is "interference with the course of justice" rather than "disorder" in itself.

When "there is an actual interference with the course of justice, there is, in that court, a departure from due

process of law in the proper sense of that term" (*Frank* v. *Mangum*, 237 U. S., at p. 335). Thus, it is the lack of due process which operates to destroy the competency of the tribunal.

The due process provisions of the Constitution are binding on Congress and Congressional committees. "The article [Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will" (*Den etc.* v. *The Hoboken Land & Improvement Co.*, 18 How. 272, 276).

That the examination of witnesses in crime investigations by Congressional committees before batteries of television and newsreel cameras, Klieg lights and flash bulbs represents a radical departure from due process appears to be the considered judgment and the consensus of opinion of the legal profession.[2]

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[2] American Bar Association Journal, January 1952, Volume 38, p. 15 *et seq.* in an article entitled "JUSTICE AND TELEVISION" by William J. Gossart, there is quoted on page 16, middle column a statement made by William North Seymour as president of the Association of the Bar of the City of New York as follows:

> "Serious consideration should be given to the recommendations of the Association of the Bar now before Congress as to procedures to be followed by such Committee so that the civil rights of individuals examined will be protected within the spirit of our Constitutional guarantees of due process. Among the recommendations of the Association are that no photograph, moving picture, television or radio broadcasting of the proceedings before such Committee shall be permitted while any witness is testifying."

The writer proceeds, on page 17, middle column to say:

> "Obviously television is diversion and distraction on a grand scale. I am not satisfied with the argument that very shortly technological improvements will eliminate the need for special lighting and still the loud whir. These are the lesser distractions. The knowledge that an invisible audience of thousands,

Indeed, the Legislature of the State of New York in its 1952 Session has enacted a law making it a misdemeanor for any one to televise, broadcast or take motion pictures of any judicial proceedings in New York State at which witnesses are compelled to testify (Civil Rights Law, Sec. 52, Cons. Laws of New York).

Governor Thomas E. Dewey of New York State when signing Civil Rights Law, Sec. 52, making it a misdemeanor to broadcast, televise or to take motion pictures of proceedings where witnesses are compelled to appear by subpoena, said among other things:

> "Official proceedings must not be converted into indecorous spectacles", "batteries of cameras, microphones and glaring lights carry with them at-

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or perhaps millions, is viewing every move will be the greatest distraction. It would be manifest that the shattering prospects of having to testify and face searching cross-examination before a large unseen audience is not calculated to produce reliable testimony from the witnesses—whether for the State or for the defense."

Compare American Bar Association Committee on Professional Ethics Opinion No. 212 (1941).

See, also, editorial in the Journal of the American Judicature Society, February 1952, Vol. 35, #5, page 131, which reads in part:

"The spectacle of witness after witness being skillfully and relentlessly examined in typical grand jury fashion about suspected criminal activities, not only of other people, but of himself as well, not behind closed doors of a grand jury room, but in a crowded auditorium before microphone and camera, with 30,000,000 people hanging on his every word, is something to give pause to every person who holds Americanism dear."

See also, "MOB JUSTICE AND TELEVISION" by Thurman Arnold in the Journal of the Federal Communications Bar Association (Vol. 12, pp. 4-9).

Senator Nixon speaking on the subject said "Televising hearings tends to create a circus atmosphere which diverts not only the witnesses but also the committee members from the serious business at hand of getting the facts. Television lights and their

tendant excitement, distractions and the potential for improper exploitation and intolerable subversion of the rights of the witness." (New York Herald-Tribune, March 28, 1952, p. 15, col. 1.)

The Governor went on further to say that it was difficult enough "for the ordinary witness to overcome nervousness in the presence of a large room full of people, a court, jury or investigating committee and the press", and that in the Governor's opinion it was "impossible if the witness is placed in front of glaring lights and knows he is being seen or heard by millions of people". (New York Herald-Tribune, March 28, 1952, p. 15, col. 1.)

Indeed this Court in regulating the conduct of criminal trials has said that "the taking of photographs in the courtroom during the progress of judicial proceedings or

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heat provide a sort of 'third degree' ". New York Herald-Tribune, March 27, 1952 (p. 3, col. 1).

In Harper's Magazine for October, 1951, Allen T. Klots, (former Special Assistant to Secretary of State Henry L. Stimson), in an article, "Trial by Television", wrote (p. 91):

"The very thought that millions of people are watching and observing every expression and gesture would induce in many of us a state of panic. Everyone is naturally at a disadvantage on the witness stand and automatically becomes self-conscious. When we add the heat and glare of kleig lights, cameras, microphones, and all the other paraphernalia that usually go with television and radio broadcasting, the experience becomes for most people a specie of torture. Indeed, it is much too close to the familiar methods that dictatorial rulers used to elicit 'facts'. The analogy is an ugly one, but it is inescapable. In most instances the embarrassment and confusion which confound the witness in such surroundings contribute not to the search for truth but to a distorted and wholly inaccurate picture."

(p. 93)

"To expect witnesses to give accurate and complete testimony in the face of the present-day television or broadcasting equipment, and the self-conscious, embarrassed state of mind that it promotes, is to expect the impossible. No search for the truth can be genuinely successful under such conditions."

radio broadcasts of judicial proceedings in the courtroom should not be permitted by the Court (Rule 53, Federal Rules of Criminal Procedure).

The Court of Appeals was in error in stating that there were "no facts" (p. 63) proved which would justify holding that the tribunal was incompetent. On the contrary, the record is clear and certain that the proceedings were broadcast by radio and television; there were special strong lights set up to aid the motion picture cameramen; and there were photographers who flashed their light bulbs during petitioner's testimony. All these facts are uncontroverted and, indeed, admitted. As we have already said, Senator Kefauver's committee reported that "the hearings in New York were watched by upwards of thirty million persons" (f. 66).

If the legal principles are correct, then the televising or radio broadcasting as well as the other conditions violated the due process amendment and made the "tribunal" incompetent. The Statute under which petitioner was convicted as well as the indictment requires that the testimony be given before a "competent tribunal". A basic ingredient of the crime being absent it follows that the conviction cannot be sustained.

The hearing before Senator Kefauver was conducted as a sort of trial.[3] It was held in a courtroom of the United

[3] See Editorial, Journal of American Judicature Society, *supra*, Vol. 35, No. 5, February, 1952 at page 131:

"It was not a judicial body, and yet the participants found it necessary to remind themselves constantly that such was the case. To the television viewer the Committee Chairman and his colleagues occupied a position roughly comparable to the Chief Justice and Associate Justices; witnesses on the 'stand' were interrogated by the Committee's counsel for all the world as if he had been a prosecutor and occasionally they had their own counsel present to protect their interests. To add to the illusion, many of the hearings were actually conducted in

States District Court in New York City. This Court's adoption of Rule 53 of the Federal Rules of Criminal Procedure barring the taking of photographs or radio broadcasting from courtrooms during judicial proceedings is indicative of the fact that it was the well considered opinion of this Court that such actions and procedure directly affected the civil rights of individuals and was in derogation of the due process amendment.

II

The tribunal before which petitioner testified was not a competent tribunal in that it was not duly constituted, and lacked a quorum.

According to the Government's witness, Alfred M. Klein, associate counsel to the investigating committee herein, the Committee's Chairman, Senator Kefauver, subsequent to September 9th, 1950, "designated the Committee of the whole as a Sub-Committe to sit in New York, and he designated any single member to be a quorum for the purpose of taking testimony" (f. 233). The designation was for any testimony to be taken in New York (f. 234).

Only one member of the Committee, Senator Kefauver, was present when the alleged perjured testimony was given (ff. 638, 697-699, Govt's Ex. 12).[4]

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court rooms and millions of viewers never knew the difference. The slips of the tongue in which those proceedings were inadvertently referred to as judicial were as revealing as they were amusing."

[4] At page 9976 of the Stenographic Record of the Senate Committee Proceedings the following appears:

"Let the record show that pursuant to authority by resolution of the whole committee, that the chairman appoints himself as a committee of one to conduct this hearing this afternoon, for the rest of the afternoon, to swear witnesses and to take sworn testimony and to make such other rulings as may be required."

The word quorum, in a general sense, means a majority of the whole body (*Zeitler* v. *Central R. Co.*, 84 Md. 304, 35H 932, 934; U. S. Constitution, Art. I, Sec. 5, Clause 1).

It may be assumed that neither Senate, nor House of Representatives, possesses authority to establish a rule that a lesser number than a majority shall constitute a quorum to do business, in view of the Constitutional mandate that "a majority of each shall constitute a quorum to do business" (Art. I, Sec. 5, Clause 1).[5]

Assuming that the above cited Constitutional provision does not bar either House from specifying otherwise with respect to a quorum of a committee and that such variant specification would be within the rule-making power of the Legislative body under Article I, Section 5, Clause 2, of the U. S. Constitution, the fact remains that Senate Resolution 202 does not specify the number, lesser than a majority, which shall constitute a quorum, but delegates that power of specification to the Committee (ff. 891, 892) providing that "a lesser number, *to be fixed by the Committee,* shall constitute a quorum for the purpose of taking testimony." This does not appear to be the *express provision* with respect to *number* that even under the view of Mr. Justice Jackson's dissent in *Christoffel* v. *U. S.*, 338 U. S. 84, 90, 91, would be required to give the presence of only a single member of the Committee status as a competent tribunal.

Again, the language "lesser number" as it appears in the Senate Resolution, should not be construed to authorize the Committee to constitute a single member a quorum, since by the general acception of the word, a quorum is an

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[5] Hinds Precedents Sects. 2950, 2988 and 2934. See also House of Representatives Rules & Manual (1949), Sect. 739. Comment by Louis Deschler, Parliamentarian that the rules require majority and minority representation on all House Sub-Committees.

assembly of *persons*, and implies a meeting and group action (*Matter of McGovern*, 291 N. Y. 104, 107; Compare Quorum provisions of Legislative Reorganization Act, at 60 Stat. 820). Thus, the minimum requirement for constituting one as a quorum is that this anamoly be expressly ordained by the House as rule-makers.[6]

III

Whether Weber visited the petitioner was not material to the scope of the investigation authorized by the senate. In any event the number of visits was immaterial.

A Committee of Congress can have no general powers to probe the affairs of the citizen (*Sinclair* v. *United States*, 279 U. S. 263; *Kilbourne* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135). Thus, it is incumbent upon the Government to show that the questions responsive to which perjury is assigned, were material to the scope of the investigation which was authorized by the Senate (*Sinclair* v. *United States*, 279 U. S. 263, 296, 297).

The scope of the authority of the Committee herein was defined and delimited by the Resolution which created the Committee (Govt's Exh. 2, ff. 886-895).

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[6] It may reasonably be argued that the Special Committee herein was incompetent, upon the additional ground that the Legislative Reorganization Act of 1946 (60 Stat. L. 812) contemplated that standing committees should do the investigative work of Congress. George Meader, in the 1947 Michigan Law Review, wrote (at p. 777):

> "The theory of the Legislative Reorganization Act was that standing legislative committees should do the investigative work of Congress. Senate Committees were given the subpoena power to that end. (See S. Rep. 1400 on S. 2177, 79th Cong. 2 Sess., PP. 1-5.)

The investigation was limited to one particular phase—namely utilization or operation in interstate commerce of one particular category of crime, namely "organized crime" (ff. 889, 890).

Residually, it is the element of interstate commerce upon which the Senate Resolution must depend for validity, since the power of inquiry is coextensive with the power of legislation (*McGrain* v. *Daugherty,* 273 U. S. 135, 177-179). The subject of intra-state crime, or intra-state corruption, would not be within the constitutional limitations on the congressional powers of investigation (*McGrain* v. *Daugherty, supra*) and the Senate indeed, did not assume to authorize the Committee to investigate crime or corruption in general but only the interstate commerce features of organized crime.

Since the relationship between criminals and politicians is not within the scope of the federal legislative function, unless the relationship be somehow integrated with interstate commerce, and since, further, the Government has the burden of showing the existence of the requisite integration, it follows that a case of perjury is not to be spelled out of the record.

Particularly, when perjury is assigned to testimony at a legislative inquiry, where there are no clearly defined issues, and no opportunity for judicial determination of the competency of a line of interrogation at the time of its elicitation, and where the zeal of investigation may readily carry the inquiry out-of-bounds of the powers delegated to the Committee, it is essential, in deference to our constitutional principles that the Government affirmatively show that the interrogation in question lies within the metes and bounds of the related matters of power, pertinency and materiality.

It is significant that this Court in its opinion in *Sinclair* v. *United States,* 279 U. S. 263, *supra,* in determining that the questions put to the witness therein were pertinent to the matter under investigation, relied heavily upon the factual showing in the record of the testimony of other witnesses and the ascertainment of other facts, which affirmatively demonstrated the immediacy of the question which the witness therein refused to answer (pp. 297, 298 of 279 U. S.).

Again, in *Barsky, et al.* v. *United States,* App. D. C., 167 F. 2d 241, 243, 244, the Court lays bare the detailed proof in the case, that the Committee therein was not engaged in a fishing expedition, but had good cause to require the production of the records it sought, in order to advance inquiry it was charged with pursuing.

In our case, in contrast, no evidence was offered even suggesting that Weber had anything to do with "organized crime" or with utilizing the facilities of "interstate commerce" and no evidence was offered showing that Weber's visits to the petitioner had anything to do with "organized crime", or with utilizing "the facilities of interstate commerce."

Indeed, the Government in its brief in the Court of Appeals below, conceded that the Government had not proved and indeed had no intention of proving that petitioner or Weber had anything to do with "policy" during the period of time when petitioner was First Deputy Fire Commissioner and the visits in question were made, or that Moran had anything to do with the underworld.[7]

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[7] The Government's brief in the Court of Appeals, stated at p. 19:

"Appellant states that the Government failed to show that Weber or Moran had anything to do with policy during the time that Moran was First Deputy Fire Commissioner. There was never any promise in the opening, nor was there need

"Policy" is synonymous with "the 'numbers racket' a purely local offense." *U. S.* v. *Singleton*, 3 Cir. 193 Fed. 2d 464, 467.

It follows that the testimony to which perjury is assigned was not material to the inquiry, nor could it influence or impede the investigating body.

In lieu of proof of specific concrete facts, tending to show materiality as appeared in the *Sinclair* case, *supra*, and the *Barsky* case, *supra*, or indeed any proof of Weber's criminal activities contemporaneous with his alleged visits to petitioner, there was offered, in our case, the "expert" opinion of chief counsel Rudolph Halley. Mr. Halley was permitted to give his conclusions respecting the purpose of the New York hearings. The purpose of the New York hearings was to investigate the connection between crime and politics, Mr. Halley affirmed several times (ff. 653-657). Although Mr. Halley intimated that the same subject has been pursued elsewhere (ff. 654, 655) there is conspicuously lacking in his expert testimony any reference to the essential requisite of utilization of interstate commerce to develop corrupt influences, as the subject of inquiry in New York.

Mr. Halley's testimony fails to supply the missing proof of materiality, on two counts: (1) It consists of abstrac-

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for proof that Weber was actually engaged in policy activities at the time of his meetings with Moran at the Fire Department or that Moran actually had contact with any persons engaged in policy during that period.

"The reference to the underworld in the opening, though somewhat derogatory, was not directed at the appellant and is no way prejudicial to him."

Compare the above with the opinion in this Court in *Sinclair* v. *United States, supra*, where Mr. Justice Butler rested the courts' finding of materiality upon proof of testimony from other witnesses directly establishing materiality (279 U. S. at p. 298).

tions and "expert" opinions, instead of facts; (2) the witness' conclusions fail to integrate the interrogations with the essential requisite of interstate commerce. (Compare, *Ellis* v. *Interstate Commerce Comm.*, 237 U. S. 434, 445; *Jones* v. *Securities Comm.*, 298 U. S. 1, 26; *McGrain* v. *Daugherty*, 273 U. S. 135, 180.)

Moreover, petitioner acknowledged that Weber had visited his office and the only issue is whether perjury may be assigned to misstatements as to frequency of visits. The exact number of Weber's visits were certainly beyond the pale of materiality and could not have any tendency to influence the investigation.

IV

The petitioner was not accorded a fair trial.

Preliminary to a discussion of the multiple phases of trial errors which operated to deprive the petitioner of a fair trial, reference appears warranted to the criterion established by this Court in *Bollenbach* v. *United States*, 326 U. S. 607, in determining whether a verdict of guilty should be permitted to stand. This Court wrote (at p. 614):

> "* * * it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether the guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal courts."

A

The Motion Picture of Petitioner's Testimony

Mr. Kingsley, the production chief for Telenews Productions, Inc., produced the film of a motion picture of

the proceedings before the Committee while the petitioner was testifying before it (Gov't's Exh. 12; ff. 630-635). While Mr. Halley was on the witness stand, the film was offered in evidence upon the prosecutor's statement that he would "like to have it shown to the jury" (f. 658). Objection was made, but overruled (ff. 659-662). Counsel then asked for an opportunity to inspect the film before it was projected before the jury, saying that he had "never heard of an exhibit which was allowed to go into evidence without the defendant or his counsel seeing that exhibit first", but the Court refused to grant such permission (f. 664).

Without an opportunity for an inspection, complete objections can hardly be made. And objections made after exhibition of an exhibit to the jury have little, if any value.

The Court of Appeals noted that the exhibition of the film to the jury without first affording defense counsel any opportunity to see it was "highly irregular" (p. 61), but held that petitioner was not prejudiced since no valid "objection could have been made" (p. 61), even though the film turned out to be a 10 minute speed-up of a three hour proceeding (p. 61).

Preliminary to the reproduction of a scene to the jury, by motion picture, it is essential that the Court determine whether or not the motion picture is an accurate reproduction of that which it is alleged occurred.

Trustworthiness of a process of reproduction, when the appropriate science or art has advanced to a certain degree of recognition may be judicially noticed but, it can hardly be urged that a photographic speed-up of approximately 1800% results in a trustworthy reproduction of anything, let alone that judicial notice should be taken of such trustworthiness.

Moreover, it is common knowledge that it is "slow-motion" projection which is utilized to clarify the camera's reproduction. "Speed-up" is definitely contra-indicated if true depiction is sought.

Moreover, lack of a sound track eliminated what light the quality of petitioner's voice might cast on his reactions to the anomalous spectacle being enacted.

Only a very limited section of the hearing now appears in the film thus constituting a further departure from reality. Under these circumstances, it is respectfully submitted that the introduction in evidence of the film, certainly its introduction without first exhibiting it to petitioner's counsel, was not a procedure or a standard appropriate for criminal trials in Federal courts.

Concededly the dramatic staging of the Committee's proceedings had some theatrical value but no legitimate purpose was served by reproducing selected parts of such proceedings on a moving picture screen before the jury. Perhaps the prosecutor felt that the jurors, during the three days of the trial, might have forgotten in part what District Attorney Hogan of New York County characterized as the "hippodrome" (p. 66). Here was the prosecutor's opportunity to revive the scene, and re-arouse the hysteria existing at the time of the Committee's public hearings. And such could be the only purpose the prosecutor had for introducing the moving picture. For the petitioner at no point had challenged the accuracy of the stenographers' report of his testimony before the Committee.

B

Denial of Petitioner's Application for a Continuance

Not only did the prosecutor press this case for trial so as to give petitioner's trial counsel little time to prepare,

but apparently the trial was "rushed in order to gain any benefit that the prosecutor might have from the unfavorable publicity accorded the petitioner" (ff. 35-59, 89-90).

On the afternoon of May 1st, two days before the trial was to commence, the Committee released to the press its third interim report, a report which originally was to be submitted to the Senate "not later than February 28, 1951" (ff. 68, 90, 895). In such report the petitioner was "directly mentioned at least thirty-eight times", most of which references "concerned matters having absolutely nothing to do with the issues here", although "highly prejudicial" to the petitioner (ff. 68, 72). On May 2nd, the metropolitan press "featured those parts of the report which referred to the petitioner" (f. 69).

The publication of such report was the climax of a vast campaign of publicity which had been carried on through the medium of every modern means of communication almost incessantly since the inception of the Committee's public hearings in New York on March 12th (ff. 64-70, 77-81).

Because of the publication of such report on the very eve of trial, and because of all the preceding prejudicial publicity, the petitioner requested the Court to postpone the trial of this case "to the opening of the October, 1951, Term of this Court" (ff. 62-63, 72). Such application was based upon the fairness required in criminal prosecutions as expressed by Mr. Justice Jackson in his opinion concurring in the result in *Shepherd* v. *Florida* (1951), 341 U. S. 50. In his opinion, Mr. Justice Jackson pointed out (p. 51):

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force

> that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."

In the ordinary criminal prosecution, the prejudicial effect of adverse publicity may be counteracted by a change of venue, in lieu of a continuance, but in petitioner's case, the pre-judgment of petitioner, was no local manifestation, but was substantially nation-wide,—co-extensive with the television, radio and press coverage. Thus, change of venue, afforded no alternative to continuance (f. 81).

In this peculiar situation where emotional influence and reaction, is the issue, the Court's acknowledgment that he was "somewhat in sympathy" (f. 100) with petitioner's position is cognizable as an inferential finding of ultimate fact of prejudice.

C

The Prosecutor's Prejudicial Opening Statement

In his opening statement, the prosecutor told the jurors that they would have to consider that the petitioner's alleged perjured testimony was "part of a calculated scheme deeply rooted in a monstrous alliance between crime and politics" (f. 213). Indeed, the entire theme of the prosecutor's opening was, in substance, that the Government would prove "a tie-up" between "the slimy creatures of the underworld" and men who held "public office" (ff. 193-194).

The prosecutor stated in great detail the petitioner's work from the time he "started his career before 1929 as a law stenographer" until he became "a Commissioner of the Board of Water Supply", sometime after he had re-

signed as First Deputy Fire Commissioner (ff. 195-199). Stress was placed upon the petitioner's association with former Mayor O'Dwyer, about whom myriad prejudicial insinuations were being made in the press (ff. 91, 100, 195-198).

The prosecutor pointed out that Louis Weber, whom the petitioner admittedly had known "for 20 or 30 years", was "a policy man and operated a policy bank", and had "a criminal record in that respect" (ff. 199, 203). After describing the "game of policy", or "poor man's lottery", at some length, the prosecutor asked the jury to "imagine" "whether that can flourish under the watchful eyes of a police force that wants to stamp it out!" (199-202). As to the latter, no proof was ever offered.

Although the Government, during the trial, was able to show, over objection, the petitioner's entire "career" and the fact that Weber had been convicted for "policy" in 1927 and for "conspiracy" in 1938 (ff. 300-308, 328-340, 352-353, 388-390), no evidence was offered to show that,—during the period from February, 1946, through July, 1950, when the petitioner was First Deputy Fire Commissioner,—Weber was engaged in "policy" or any other form of gambling.

To begin with, if the Government, as it admitted in its brief in the Court of Appeals did not intend to prove that Weber was engaged in policy activities or petitioner was a politician linked with the underworld,[8] the statements should never have been made, explicitly or implicitly. In

[8] See quotation from Government's brief, in footnote 7, page 21, *supra*. It contradicts the statement in the opinion of the Court of Appeals below (p. 59 of Supplement) that "* * * we cannot say that when the opening was made the prosecutor did not intend to prove the statements he made."

Lewis v. *United States,* 6th Cir., 11 F. 2d 745, 746, the Court noted that " * * * an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it". The Court, in the cited case, was referring to defendant's counsel. That admonition has vastly greater urgency when applied to the prosecutor whose special duty it is, as a representative of the sovereignty, to refrain from utilization of improper methods to obtain a conviction (*Berger* v. *United States,* 295 U. S. 78, 88).

Moreover, the petitioner's counsel at the time the opening statements were made had the right to assume that the Government would at least attempt to prove its statements and that the Government was not embarked upon an incompetent inflammatory discourse.

Thus, no waiver can be assigned to petitioner's counsels' omission to object and the close of the Government's case was the first opportunity afforded petitioner to register his objections, by motion for a new trial (ff. 729-733). The motion was overruled (f. 739). It should have been granted. (*Quig* v. *United States,* 3rd Cir., 33 F. 2d 820; *Minker* v. *United States,* 3 Cir., 85 F. 2d 425; *People* v. *Wolf,* 183 N. Y. 464; *Berger* v. *United States,* 295 U. S. 88.)[9]

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[9] The following quotation from *Quig* v. *United States,* 33 F. 2d 820, 822 appears particularly apropos herein:

> "These statements made by the district attorney in his opening to the jury, before the offer of any testimony or any opportunity for the defendant to object or the court to pass on such objection, very naturally took serious, and perhaps, permanent lodgement in the mind of the jury. They went far beyond the rights possessed by government counsel in outlining its case to the jury; contained statements wholly incompetent, were seriously prejudicial to defendant's case and should not have been admitted."

This the Court held was ground for reversal.

Moreover, when the jury returned to the courtroom, the Trial Court delivered no admonition whatever to the jury respecting disregard of the Government's opening statement.

A mere general charge by the Court that "any statements made by counsel unless supported by evidence are not to be considered" (ff. 825-26) failed to cure the error. The "derogatory" remarks still remained before the jury, the references to the "underworld" were not withdrawn, the charge that this was "part of a calculated scheme deeply rooted in a monstrous alliance between crime and politics" still remained in the minds of the jurors. The error was clear, the prejudice certain. There was no excuse for this conduct. There is no palliation for the wrong done to the petitioner. It was deliberate, it was preconceived and the open purpose was to create an atmosphere of hostility against the petitioner.

The general charge failed to admonish the jury, that the Government had failed to prove that petitioner was linked with the underworld, or that he was part of a monstrous alliance between crime and politics.

D

It Was Improper to Attack Petitioner's Character During the Government's Direct Case

The deliberate attack on petitioner's character took several forms. Over objection, testimony was given as to (a) petitioner's life, history, his background, his education and his work record (ff. 296-300, 301-303, 333-334); (b) charges intimating that petitioner was not qualified for the various public offices that he held (ff. 328-330); (c) detailed evidence of petitioner's acquaintance with former Mayor O'Dwyer (ff. 304-305, 307-309, 340); and

(d) petitioner's authority and actions and the scope of his duties while he was Water Commissioner for the City of New York at a time long after the Weber visits (ff. 333-338).

The above was offered, according to the prosecutor's own words "as part of the character of this man" and "part of the background of this man's character" (f. 339). It is significant to note that when the prosecutor said that the testimony was "all part of the background of this man's character", the Court replied "Yes, I will take your word for it" (f. 339). Petitioner never testified at the trial.

A defendant's character may not be attacked until it is put in issue (*U. S.* v. *Modern Reed & Rattan Company,* 2d Circ., 159 F. 2d 656, 658; Cert. den. 331 U. S. 831). On appeal, the Government attempted to claim that the testimony had been offered as "bearing on materiality and motive" (Government's brief, Court of Appeals, p. 22). If this be true, then the prosecutor's statement that the testimony was offered "as part of the character" of petitioner (f. 339) was calculated to deceive the jury, more particularly since the Court took the prosecutor's "word for it" (f. 339).

A motion for a mistrial made upon the ground "that the Government had put" petitioner's "character into issue" (ff. 738, 744-747), was denied without explanation or withdrawal by the Government. On this subject the Court of Appeals said that counsel misconceived "the purpose of this evidence" (p. 60). This was obviously contrary to the record. Counsel was obliged to accept, as the jury and the Court did, the prosecutor's statement that the evidence was offered "as part of the character of this man" and "part of the background of this man's character" (f. 339). In any event testimony cannot be illegally offered for one

purpose and then used later "on appeal as if admitted at another stage in aid of another purpose innocent and lawful". Cardozo, *Ch. J.*, in *People* v. *Zackowitz*, 254 N. Y. 192, 200, cited in *Shepherd* v. *U. S.*, 290 U. S. 96, 103.

Proof was admitted that Weber had been convicted of "policy" in 1927 and of "conspiracy" in 1938, both local offenses (ff. 388, 389). Testimony so remote is probative of nothing relevant to the issues.

The petitioner's query, "Is this going to be a case of guilt by association?", was but natural (360). There was no connection between Weber's past convictions for "policy" and "conspiracy" and the incidents which formed the basis of the alleged perjury charge. The proof was offered solely to besmirch the petitioner and circumvent the established rule that attack on a defendant's character is not permitted unless and until a defendant chooses to place in issue his reputation or character. In any event it was error to receive evidence of an offense other than that charged,[10] more especially if committed by another, not a party to the matter.

E

The Prejudicial "Expert" Testimony of Committee's Counsel

Mr. Halley in testifying with respect to "the purposes of the New York hearings said:

> "The Committee was investigating many crimes, including gambling, embezzlement, extortion. We were looking into certain murder cases: * * *" (f. 653).

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[10] *People* v. *Richardson*, 222 N. Y. 103, 106; *People* v. *Marendi*, 213 N. Y. 600, 618.

> "In connection with that, the Committee, of course, wanted to know two things: What kind of crime had been occurring on a large organized scale? Were they confined to gambling, or did they include extortion, waterfront racketeering, murder and many other things?" (f. 657).

The Court of Appeals comment upon this testimony was (p. 60):

> "The statement that the Committee was *investigating crimes of this character was irrelevant to the case or trial* but we fail to see how it could have prejudiced the defendant whose only alleged connection was with Weber, a gambler". (Emphasis ours.)

The cataloguing of divers nefarious crimes—crimes with which the petitioner had nothing to do—was extremely prejudicial. Such evidence was admitted over repeated objections. In the Court of Appeals, reliance was had by the prosecutor upon the "harmless error" rule. The "dead record" cannot properly portray the impact that testimony of murders, waterfront racketeering and other such kindred offenses had on the trial jury (*Bollenbach* v. *U. S.*, 326 U. S. 607, 615).

We respectfully submit that there was no proof that Weber was then a gambler.

V

The two witness rule in perjury prosecutions was not satisfied.

"Whatever may be thought of the archaic rule as to proof of perjury, it is still the law in the federal courts" that the "rule requires 'direct' proof of the crime by two witnesses who testify that the accused violated his oath, or 'direct' proof by one witness plus corroborating circumstances". And such rule "means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief". *United States* v. *Remington* (2nd Cir., 1951), 191 F. (2d) 246, 249, 250.

Such rule is bottomed upon the sound principle that "a conviction for perjury ought not to rest upon an 'oath against an oath' ", "Since equally honest witnesses may well have differing recollections of the same event". *Weiler* v. *United States* (1945), 323 U. S. 606, 609.

Here the Indictment charges that the petitioner deliberately lied when he stated that Weber had visited him at his office "about three" times or possibly "one or two more than that * * * in fact the defendant did see said Weber at his office no less than approximately 50 times" (ff. 22-24).

Therefore, here the "overt Acts" which the Government had the burden to "prove as required in perjury" (*United States* v. *Remington, supra,* p. 250), and from which it could argue that the petitioner deliberately lied, were that the petitioner had seen Weber at his office "no less than approximately 50 times". And the prosecutor, of course, was well aware of such burden. Indeed, in his opening statement to the jury, the prosecutor declared that he would "produce those firemen" who "will testify to having seen Weber many, many times, * * * and it will not be

limited to the 50 times mentioned in the Indictment" (f. 207).

Yet, the Government, in accordance with the requirements of the rule in perjury cases, wholly failed to prove the overt acts alleged, that is, that "the defendant did see Weber at his office no less than approximately 50 times".

Only one witness, Fireman Martin, testified that Weber visited the Fire Department reception room about "60 or 65 times" and that the petitioner actually "saw Weber approximately 50 times" (ff. 508, 509).

The three other firemen did not corroborate Mr. Martin. Fireman Doyle testified that, while Weber had visited the reception room about "forty or fifty times", the petitioner had seen him only about "fifteen times" (ff. 578, 579). Fireman McAllen testified that Weber had visited the reception room "six times approximately" but that the petitioner had seen Weber only "on four occasions" (ff. 471, 472). And fireman Daly testified that Weber had visited the reception room "about 30 times" but could not say "how many times Mr. Weber actually saw Mr. Moran" (ff. 414, 446-447).

The differing recollections of the very witnesses in this case, concerning their conclusions as to the number of times the petitioner saw Weber at his office, furnish a good example of why the Courts insist upon the two-witness rule in perjury cases.

Admittedly, there "was nothing set or scheduled about his (Weber's) visits"; he was "Just another visitor" (ff. 444, 515). He had visited the petitioner's office merely "looking for a job to do some ship scraping" for the Fire Department, a job which neither the petitioner nor the Fire Department ever gave him (ff. 319, 320). And his

last visit to the petitioner's office had concededly been some time "in the early spring of 1950", a year or so before the petitioner testified before the Committee (f. 517). Thus, Weber's visits over the four and a half year period had been irregular, casual, and of short duration, and had taken place a year and more before the petitioner's alleged perjured testimony (ff. 420, 474).

Under such circumstances, there was no reason for the petitioner to recall the exact number of times Weber had visited him at his office. He could merely give the Committee his best recollection.

And if the petitioner's recollection, while he was before the Committee answering myriad questions concerning diverse matters, differs from the recollections of some of the receptionists, while testifying in the calm of a judicial trial, such fact does not logically indicate that the petitioner was testifying to something he did "not believe to be true". The fact that others differed as to the number of Weber's visits does not establish that the petitioner was deliberately lying when he gave the number as "three, four, five or six".

Before trial, the petitioner moved for a bill of particulars giving the "approximate date or dates * * * when the Government will claim that the petitioner saw Louis Weber at the office of the First Deputy Fire Commissioner of the City of New York", but such motion was denied (ff. 4, 30). And even during the trial the petitioner was unable to elicit from any of the witnesses even an approximate date, or week, or month, or year of any one of Weber's visits to the petitioner. Indeed not one of the witnesses could even associate any event or occasion with a single one of Weber's visits to the petitioner.

Because of the lack of necessary corroboration, the petitioner moved for a directed verdict of acquittal on the ground that "as a matter of law * * * there has been no corroboration of the charge here", and such motion should have been granted (ff. 711, 715).

CONCLUSION

The writ of certiorari should be granted.

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With him on the brief.